No. 17359

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,

v.

H. F. KEELER and ALICE H. KEELER, his wife,
Appellees and Cross-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE WILLIAM G. EAST, *Judge*

PETITION FOR REHEARING

DEWITT WILLIAMS
WILLIAM D. CAMERON
Attorneys for Appellees and Cross-Appellants

ROSLING, WILLIAMS, LANZA & KASTNER
1440 Washington Building
Seattle 1, Washington

METROPOLITAN PRESS AND WESTERN

No. 17359

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,

v.

H. F. KEELER and ALICE H. KEELER, his wife,
Appellees and Cross-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE WILLIAM G. EAST, *Judge*

PETITION FOR REHEARING

DEWITT WILLIAMS
WILLIAM D. CAMERON
Attorneys for Appellees and Cross-Appellants

ROSLING, WILLIAMS, LANZA & KASTNER
1440 Washington Building
Seattle 1, Washington

INDEX

TABLE OF CASES

STATUTES AND TEXTBOOKS

COMES NOW appellee and respectfully petitions for a rehearing on the following grounds:

Appellee has been deprived of due process of law and a fair consideration and hearing in this appeal, because: (a) The opinion issued is based on certain points not raised or considered in the briefs and argument and as to which appellee has had no opportunity to present his contentions; (b) Said basic points in the opinion, so far as they are said to be rested on authority, are based on cases not cited by the government and as to which appellee has had no opportunity to respond, and (c) Errors of law in the opinion.

THE GOVERNMENT'S APPEAL

1. As Related to the Application of 26 U.S.C. § 166

Appellee properly elected to have his claims in this case decided by a jury. By the joint, but conflicting action of the District Court and the Court of Appeals, appellee herein has been deprived of this constitutional right to jury trial. The District Court, on its own* took the case from the jury and decided as a matter of uncontroverted fact that appellee "entered into this transaction solely as his relation to and a part of his going business here in Seattle" (R. 397-398). ". . . But, as I say, the whole transaction was in relation to this business, as I view it, under the undisputed facts." (R. 405).

If the Court of Appeals disagreed with said view of the facts, we submit that it should have remanded the case

*Appellee's motion for directed verdict had been upon the ground that, as a matter of law, the loss was not a "bad debt" under 26 U.S.C. § 166, but rather a loss deductible under 26 U.S.C. § 165 (see appellee's position stated at Appellees' Answer Brief, p. 38, et seq.).

for submission to a jury. As stated in the opinion at page 6:

> "Whether a particular loss or expense is incurred in a taxpayer's trade or business is a question of fact in each particular case. *Higgins v. C. I. R.*, 312, U.S. 212; Treas. Reg. 1954 Code § 1.1665."

"Proximate" relationship (in the similar field of "proximate cause") has repeatedly been held to be a question of fact. 5 C. J. S. § 1454 at p. 580.†

Having concluded that the District Court erred in his factual view of the case, we submit that this court should permit appellee to submit said issue of fact to a jury in a new trial. The court erroneously relied upon *Washburn v. C. I. R.*, 51 F.(2d) 949 (C.A. 8th, 1931), in terminating the case at the appellate level. This is one of the cases not cited in the government's brief and raises an issue as to which appellee has had no opportunity to be heard. Furthermore, that case is irrelevant as the court there was considering, not the review of a *jury case* in which the appellate power to pass upon issues of law and of fact are sharply divided, but rather was reviewing a Board of Tax Appeals decision in which different principles of review are involved. This difference of a *jury case* in which the appellate power to pass upon issues of law and of fact are sharply divided, but rather was reviewing a Board of Tax Appeals decision in which different principles of review are involved. This difference is shown by the following quotation from *Tricou v. Hel-*

---

†As stated in *Martin, Tony v. C. I. R.*, 25 T. C. 94 (1955):

> "The only issue, therefore, in determining the business or nonbusiness character of the bad debt in question is whether there existed in the instant case the requisite proximate relation of the bad debt loss to the conduct of the taxpayer's business. *Such question is one of fact* to be decided upon the particular circumstances involved in each case. *Samuel Towers*, 24 T. C. 199 (1955); *Robert Cluett, 3rd*, 8 T. C. 1178 (1947)." (Emphasis supplied)

vering, 68 F.(2d) 280 (C.C.A. 9, 1933) where the court, in commenting upon the *Washburn* case, sharply distinguished between the intermixture in board decisions of questions of fact and law as distinguished from the sharp separation of these issues in court cases (and we submit particularly in jury cases):

> "It seems to us that this was an exercise by the appellate court of the very power confided by the Congress in the Board of Tax Appeals, even if it be conceded that finding that a person was engaged in a trade or business is a mixed finding of law and fact. It seems to have been assumed by the courts dealing with this very question of whether or not the taxpayer was engaged in trade or business that *the methods of procedure before the Board of Tax Appeals are not calculated to separate questions of law from questions of fact in the way they are separated in a court of law,* and therefore to endeavor to dispose of the matter by conceding to the Board of Tax Appeals its power to find the facts and exercising the power on the part of the court to declare the law. In many cases it is clear from the record before the Board of Tax Appeals that they have misconstrued the law and, where that is apparent, it has not been thought necessary to too nicely discriminate between the ultimate conclusion of fact and the evidentiary facts and statements of law contained in the findings and opinion. (Cases deleted; emphasis supplied)

The court, for the first time in the history of the applicable law, has (on the basis of cases not submitted on brief, and without the benefit of a hearing on the point) decided that the factual issue of proximate relationship can be completely taken away by an appellate court from a jury. This we submit if adhered to (especially when there is present evidence of intent and reasonable prospect of benefit to taxpayer's business) results in denial of due process in the resolution of a basic fact issue neces-

sary to be decided in every case involving the application of 26 U.S.C. § 166.

2. As Related to the Application of 26 U.S.C. § 165

The opinion of the court completely disregards appellee's alternative ground of recovery which was that he was entitled to a fully deductible loss under 26 U.S.C. § 165. This is based not only upon the cited cases holding that when a debt is fully compromised, leaving nothing further owing, the loss is not a deductible debt under 26 U.S.C. § 166 but is deductible under § 165, but also upon the point that, by the time a loss occurred, it was bottomed on entirely different facts than mere non-payment of a debt. This is fully developed, beginning at page 48 of appellees' brief, which, for sake of brevity here, we urge the court to reread, especially since the contention was disregarded in the opinion. Briefly, appellee, at the time of compromise, released an admitted security interest and a secured indebtedness to obtain release from his guarantee to the bank. Consideration given for release from a guarantee, or payment made on a guarantee *where subrogation of the rights of the creditor does not result* (as in this case), constitutes a loss deductible under 26 U.S.C. § 165. (See cases cited at p. 49 of answer brief.)

The citations of the court at page 13 to *Spring City Co. v. Commissioner*, 292 U.S. 182 (1934), and *Putnam v. Commissioner*, 352 U.S. 82 (1956), are relevant only to bad debt losses under § 166. The loss having occurred in the relinquishment of the security to obtain release from the bank guarantee, we must respectfully disagree with the statement of the court at page 13 that "there is

no question that the $88,588.90 loss arose as a result of a bad debt and not otherwise." Appellee specifically advanced this view at pages 48 et seq. of the answer brief and on rehearing this phase of the matter should be reexamined.

CROSS-APPEAL

The Cross-Appeal was decided upon a point not raised in the government's brief and as to which appellee had had absolutely no opportunity to be heard, the gist of the opinion being that "certainly when the loss passed to taxpayer by virtue of the guarantee agreement, he should be entitled to no more favorable consideration than the original losers" (p. 17). This is a novel holding (and limitation upon § 165 (a)), not heretofore stated by any other court and totally unsupported by authority. Certainly if it is to stand as a controlling interpretation of § 165(f) appellee should have an opportunity to be heard on it, especially as the statement is in direct conflict with decisions thus far decided. For instance, in *Hale v. Cmr.*, 32 B.T.A. 3 and *Carl Hess*, 7 T.C. 333, involving guarantees against loss on stock, the party indemnified would have been entitled only to a capital loss under 165(f) and yet the indemnitor was allowed a full loss under 165(a).

Appellees respectfully submit that this Petition for Rehearing should be granted to give them an opportunity to meet and argue the new principles announced in the opinion, not heretofore raised on briefs and either based upon cases not cited in brief or unsupported by previous relevant authority.

Respectfully submitted,

DeWitt Williams
William D. Cameron
Attorneys for Appellees and Cross-Appellants

CERTIFICATE

The undersigned counsel for appellees and cross-appellants certify that in their judgment the foregoing petition is well founded and that it is not interposed for delay.

DeWitt Williams
William D. Cameron